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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KYLE SHIRAKAWA HANDLEY, Defendant and Appellant.	G056608 (Super. Ct. No. 13CF3394) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Cliff Gardner and Daniel Buffington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kyle Shirakawa Handley was convicted of multiple crimes for participating in a brutal kidnapping scheme that resulted in one of the victims being tortured and sexually mutilated. On appeal, he contends 1) he did not receive adequate notice of the charges, 2) the jury was improperly instructed on how to view accomplice testimony, 3) he was denied due process by virtue of a two-week recess that occurred during the trial, and 4) his sentence violates Penal Code section 654.[1] Finding these contentions unmeritorious, we affirm the judgment.

FACTS

Appellant and the targeted victim, Michael S., were not strangers. In 2011, appellant was a marijuana vendor, and Michael co-owned two medical marijuana dispensaries in Orange County. Michael purchased marijuana from appellant for his dispensaries, and the two became friends. Their friendship was on full display in May 2012, when appellant joined Michael and his other friends in Las Vegas for a weekend getaway. During the trip, Michael freely spent thousands of dollars on food, lodging and entertainment. And, as was his wont, he paid for everything with cash.[2]

Appellant appeared to have a good time in Vegas. But after the trip, he suddenly stopped communicating and doing business with Michael. Although Michael tried contacting him on several occasions, appellant never returned his calls or came by his dispensaries, as he had done in the past. Appellant disappeared from Michael's life, both professionally and personally, for no apparent reason.

At the time, Michael really didn't give that development much thought. His dispensaries were doing well, and he was happily renting a room in a house on the Balboa Peninsula in Newport Beach. He certainly did not foresee the dark events that

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[1] All further statutory references are to the Penal Code.

[2] Due to the federal prohibition on marijuana sales, credit card companies and banks were unwilling to do business with Michael's dispensaries. Consequently, Michael took in a lot of cash he had nowhere to deposit.

transpired in his life on October 2, 2012, which was roughly five months from the last time he had seen or heard from appellant.

That evening, Michael was awakened in the middle of the night by two men who were pointing a flashlight and a shotgun in his face. When Michael reached for the gun, the men beat and choked him, causing him to pass out momentarily. The men bound Michael's feet together and tied his hands behind his back with zip ties. They also blindfolded him and taped his mouth shut. Then they dragged him down the stairs and placed him in a hallway next to his roommate Mary B., who, like Michael, was awakened at gunpoint, tied up, gagged and blindfolded by the intruders. However, unlike Michael, Mary was not harmed in any other way. To the contrary, they assured her, "This isn't about you. Just be quiet. Don't fight . . . and you'll be alright."

Mary noticed the men spoke with a fake Spanish accent, as if they were trying to disguise their voices. She also surmised there were three intruders in all because while one of them stood guard over her and Michael in the hallway, she heard two others ransacking the residence upstairs. After about 15 minutes, those two returned downstairs and asked Michael, "Where's the money?" Michael said he had $2,000 hidden in a sock in his room, but the men were not interested in that. They told Michael they wanted a million dollars from him. When Michael said he did not have that much money, they carried him and Mary to a van outside and took them to the Mojave Desert.

Along the way, Michael was subjected to horrific abuse. His captors thought he had buried a million dollars somewhere in the desert, and in order to get him to tell them where it was, they repeatedly stomped him with their boots, beat him with a rubber hose, shocked him with a taser, and burned him with a blowtorch. Michael tried to explain to them that there was no million dollars, but every time he did so, they abused him some more.

Although the men did not harm Mary, she was in the back of the van with Michael during the entire trip. In fact, she was so close to him that when his legs

twitched from being tasered, they would sometimes come into contact with her. The men beat and berated Michael whenever that happened. Even though his leg movements were involuntary, they used every excuse they could find to abuse him. All told, the tasering, burning and beating went on for about two and a half hours before the van finally pulled over on a deserted road out near Rosamond.

Michael and Mary were still tied up and blindfolded when the men carried them out of the van and put them down on the desert sand. Michael continued to insist he knew nothing about any million dollars. Eventually, the men gave up on the money and told Michael that if they couldn't get the million dollars, then they "want[ed] his dick." They proceeded to hold Michael down, lower his shorts and put a zip tie around the base of his penis. Then one of the men took out a knife and began cutting off Michael's penis. As he was doing so, the man chimed out the words "back and forth, back and forth" in a sing-songy manner, as if he thought Michael's suffering was a joke. When he finished the deed, he doused Michael with bleach with the help of his companions. Then he turned to Mary and told her he was going to toss his knife into the nearby bushes. He said if she could find the knife and cut herself free, it would be her "lucky day." He then tossed the knife, told Mary to count to 100, and left with his cohorts in the van.

Mary managed to hitch up her blindfold and retrieve the knife, just as the desert sun was beginning to appear on the horizon. She then walked about a mile to the main road and flagged down a patrol officer from the Kern County Sheriff's Department. Mary directed the officer back to where Michael was located, and when they arrived there, Michael was lying in the dirt, writhing in pain. Although he survived the ordeal, he suffered burns and bruises all over his body. And despite a thorough search of the area, his severed penis was never found.

During the ensuing investigation, Michael told police he had no known enemies and could not think of anyone who would want to harm him. But when the police canvassed Michael's neighborhood in search of clues, they got a break. It turned

out that on the afternoon of the kidnapping, one of Michael's neighbors saw a white pickup truck in the alley near Michael's house. There were three men near the truck, one of whom was wearing a hardhat. They extended a ladder onto Michael's house, as if they were there to do construction work, but they had no equipment and there was no construction going on in the area. Thinking this suspicious, the neighbor jotted down the truck's license number. Upon running the number, investigators learned the truck was registered to appellant.

At that time, appellant was living in Fountain Valley. When the police searched his home, they found a bleach-stained shirt and zip ties resembling those used in the kidnapping. They also noticed a very strong smell of bleach emanating from appellant's truck and found a glove in the passenger compartment of the vehicle. The glove contained DNA from appellant's friend and business associate Hossein Nayeri, and DNA belonging to appellant's high school buddy Ryan Kevorkian was found on one of the zip ties.

Upon investigating Kevorkian, the police learned his wife Naomi had worked with appellant and Nayeri in their marijuana business. In the months leading up to the kidnapping, she enlisted a co-worker to create a phony email account that was used to purchase tracking and surveillance equipment that was sent to appellant's home. In addition, she purchased a shotgun and rented the van that was used in the kidnapping.

After the police arrested appellant, Nayeri fled to Iran, leaving behind his wife Cortney Shegerian. Shegerian was not cooperative when investigators initially contacted her. However, she eventually agreed to tell the truth and testify at appellant's trial in exchange for a grant of immunity. She also worked with law enforcement to lure Nayeri out of Iran to Europe so he could be extradited back to the United States.

Appellant, Nayeri, Naomi and Kevorkian were charged with two counts of kidnapping for ransom, and one count each of aggravated mayhem and torture. (§§ 209,

subd. (a), 205, 206.) It was also alleged they inflicted great bodily injury on Michael while torturing him. (§ 12022.7.)

Appellant was tried separately. At that trial, Shegerian testified about her relationship with Nayeri and the scheme to kidnap Michael. She said Nayeri was very abusive to her and also very cunning.[3] Shegerian also testified that Nayeri and appellant were very close friends. Not only did they grow marijuana together, appellant lived with Nayeri and Shegerian in Newport Beach in the fall of 2011. However, by the spring of 2012, the year the kidnapping occurred, appellant had moved to Fountain Valley, and Nayeri was spending most of his time conducting surveillance activities.

The primary focus of those activities was Michael. Using high-tech cameras and sophisticated GPS equipment, Nayeri monitored Michael's car, home and businesses, as well as his girlfriend and his parents. Nayeri also had Shegerian look up Michael on the internet and talked to her about how they could go about poisoning his dog.

In September 2012, a few weeks before the kidnapping, Nayeri was monitoring Michael on his home computer while Michael was in the desert exploring a potential mining investment. Nayeri asked Shegerian, "Why would someone be circling out in the desert?" He then suggested that would be a great place to bury cash.

Around this same time period, Shegerian saw Nayeri and appellant laughing one day while they were playing around with a blowtorch in Nayeri's garage. In addition to the blowtorch, Nayeri had a hardhat that he was scuffing up on the ground to make it look worn.

At the end of September, as the kidnapping date grew closer, Nayeri had Shegerian purchase four disposable "burner" phones. He gave one of the phones to

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[3] Cunning enough to break out of the Orange County Jail while awaiting trial. He was on the lam for about a week before authorities apprehended him.

Shegerian, one to appellant, and he kept one for himself.[4] When appellant had trouble activating his phone, Nayeri had Shegerian explain to him how to do it.

On the night of the kidnapping, Nayeri told Shegerian to use his iPhone in the vicinity of their home, in an apparent attempt to create an alibi. She didn't hear from him again until eight o'clock the following morning. Calling from his burner phone, he instructed Shegerian to put money in a meter where appellant's truck was parked on the Balboa Peninsula. Shegerian did as told. At Nayeri's behest, she also bought four more burner phones and gave them to Nayeri that evening.

According to Shegerian, Nayeri was frantic after appellant was arrested. After destroying his phones, computers and surveillance equipment, he took a one-way flight to his native Iran. During the first few months he was there, he convinced Shegerian to send him money and lie to the police about his involvement in the case. However, as noted above, Shegerian eventually helped authorities capture Nayeri in 2013.

Although Shegerian was an important witness for the prosecution, she was not involved in the actual kidnapping, and thus her testimony did not directly implicate appellant in the alleged offenses. However, based on all the evidence that was presented, the prosecution theorized appellant, Nayeri and Kevorkian all worked together to carry out the kidnapping scheme. In particular, the prosecution maintained Nayeri was the group's leader, Kevorkian provided muscle for the operation, and appellant played an integral role as the driver of the van. Of course, given his prior relationship with Michael, appellant also knew Michael was involved in a lucrative, all-cash business. The prosecution argued this provided defendants with a compelling financial motive to commit the alleged offenses.

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[4] Shegerian didn't know what happened to the fourth phone, but the prosecution theorized Nayeri gave it to Kevorkian so they could communicate with one another during the kidnapping.

At trial, appellant did not present any evidence in his defense, nor did he dispute the prosecution's portrayal of Michael and Mary as the victims of a brutal kidnapping scheme. Rather, he claimed there was insufficient evidence tying him to that scheme.

Shortly before the parties rested, the charges against appellant were modified in two respects. On the prosecution's motion, the section 12022.7 great bodily injury allegation charged in connection with the torture count was dismissed. In addition, two special allegations were orally added to the kidnapping for ransom charges, namely that Michael suffered bodily harm and that Mary was exposed to a substantial risk of death. Appellant did not object to the inclusion of those special allegations, which were explained in the jury instructions, discussed in closing argument, and included in the verdict forms.

In the end, the jury found appellant guilty of the four substantive charges, and it found the two newly-added special allegations attendant to the kidnapping for ransom charges to be true. The trial court sentenced appellant to consecutive terms of life in prison without parole (LWOP) on the kidnapping counts, plus consecutive terms of seven years to life on the aggravated mayhem and torture counts. This appeal followed.

Notice of the Kidnapping Charges

Appellant contends the jury's true findings on the special allegations added to the kidnapping for ransom counts, as well as the LWOP sentence he received on each of those counts, must be reversed because he was never formally charged with those allegations. Although appellant was orally informed of the allegations, and his attorney consented to them, he argues their inclusion in the verdict form violated his due process rights because he was never advised they exposed him to a sentence of LWOP. The Attorney General claims appellant forfeited this argument by failing to object to the special allegations in the trial court. He also maintains appellant was afforded sufficient notice of the special allegations to comport with due process. Although we reject the

Attorney General's forfeiture claim, we agree with him that appellant's due process rights were not violated by the manner in which he was charged, convicted or sentenced with respect to the kidnapping for ransom charges.

Appellant's claim requires us to examine the charging documents and the particular offenses at issue in this case. In count 1 of the complaint, appellant was charged with kidnapping Michael for ransom pursuant to section 209, subdivision (a), and in count 2, he was charged with committing the same offense against Mary.

Subdivision (a) of section 209 states that anyone who kidnaps another person for ransom "is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm."

When the victim suffers bodily harm or is exposed to a substantial likelihood of death, thus triggering the greater sentence of LWOP, the offense is elevated from simple kidnapping for ransom to aggravated kidnapping for ransom. (See *People v. Eid* (2010) 187 Cal.App.4th 859, 868, fn. 6; *People v. Chacon* (1995) 37 Cal.App.4th 52; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1237.) Because neither one of those circumstances was alleged in the complaint here, the parties agree appellant was originally charged with simple kidnapping for ransom.

At the preliminary hearing, the prosecution presented evidence of the harrowing circumstances under which Michael and Mary were kidnapped and the serious injuries Michael suffered at the hands of his captors. The preliminary hearing judge determined there was sufficient evidence to bind appellant over for trial on all of the charges and allegations.

The subsequently-filed information mirrored the complaint in all material respects. Like the complaint, it alleged simple kidnapping for ransom in counts 1 and 2, not the aggravated form of that offense.

. At trial, the only disputed issue was identification. Toward the end of the prosecution's case, the judge met with the parties to discuss jury instructions. The prosecution proposed CALCRIM No. 1202, which sets forth the requirements for aggravated kidnapping for ransom. Defense counsel did not object to that instruction. And since his theory of the case was that appellant was not involved in the subject kidnapping, he did not request instructions on any lesser offenses. When the court asked appellant if he agreed to forego instructions on any lesser offenses, he said, "That's fine."

On the next court date, shortly before the parties rested, the trial judge met with counsel outside the presence of the jury to formalize a few matters. Appellant was also present during this meeting. At the outset, the judge stated, "Counts 1 and 2, the 209 contains a special, additional factor if great bodily injury was inflicted. The People also allege a 12022.7, great bodily injury, sentencing enhancement, as to [the torture charge in] count 4, which I understand they have a pending motion regarding."

The judge's description of the charges was not entirely accurate. As noted above, section 209, subdivision (a) uses the term "bodily harm," not "great bodily injury," which is the gravamen of the sentence enhancement provided in section 12022.7. The court's mistake turned out to be contagious because, as the meeting progressed, the prosecutor also conflated those two terms, as shown below.

Continuing, the judge stated he "prepared jury instructions asking the jury to make findings on both the substantive crime [of kidnapping for ransom] and then whether or not that crime, if committed, great bodily injury was inflicted. [¶] The way that the CALCRIMS read, it should be a special finding, but it's not technically a sentencing enhancement and the like." When the judge asked defense counsel if he had any objection to the court instructing the jury in that manner, he said no.

With that, the prosecution moved to dismiss the section 12022.7 great bodily injury enhancement allegation attached to count 4, the torture count. The judge responded, "That request is granted and the court will then remove the great bodily injury jury instruction from that [count] making sure that it's still contained in counts 1 and 2[.]" The following discussion then took place:

"[Prosecutor Brown]: . . . In regards to the second count involving Mary . . ., if the court could take a look at the actual verdict that the People drafted in regards to count 2, there is kind of an 'or' within [section 209, subdivision (a), of] the Penal Code. []There is gbi inflicted on the person [']or' and our theory of liability is the 'or' part. [¶] So I know the court just drafted a special instruction regarding that finding. It's a little different with regards to our theory on Mary[.]

"[Prosecutor Murphy]: We apologize for the lateness, Your Honor. We were actually dealing with this up until last night.

"The Court: Noted. [¶] So your theory is intent to confine [in] a manner [] that exposes [Mary] to a substantial likelihood of death?

"[Prosecutor Murphy]: Yes."

The judge asked defense counsel if he had any objection to the prosecution pursuing that theory, and he said he did not. The judge then told the parties he would be modifying the jury instruction as to count 2 to comport with that theory.

Alas, the instruction on the kidnapping for ransom charge in count 2 informed the jurors that if they found appellant guilty of that offense, they must decide whether the prosecution proved the additional allegation that Mary was exposed to a substantial likelihood of death. And the instruction on count 1 stated that if the jurors found appellant guilty of kidnapping for ransom as alleged in that count, they must decide whether the prosecution proved the additional allegation that Michael suffered bodily harm.

During closing arguments, the prosecutor argued there was ample evidence to support those allegations, and defense counsel did not disagree. Defense counsel instead took the position that appellant had nothing to do with the kidnapping plan that led to Michael suffering bodily harm and Mary being exposed to a substantial likelihood of death.

The jury rejected defense counsel's argument. It not only found appellant guilty of kidnapping for ransom, as alleged in counts 1 and 2, it also found true the special allegations of bodily harm as to Michael and substantial likelihood of death as to Mary. Appellant did not object to the inclusion of those allegations in the verdict forms, nor did he object to lack of notice when the trial court sentenced him to LWOP on those two counts. However, because neither the complaint nor the information included those allegations, he now contends he was improperly convicted of a greater offense (aggravated kidnapping for ransom) than that with which he was charged (simple kidnapping for ransom) in violation of his due process rights. For reasons we now explain, we disagree.

Due process is an integral component of our criminal justice system. Among other things, it requires that an accused be afforded "'fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial.' [Citation.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) This notice requirement extends to any "allegations that will be invoked to increase the punishment for [the defendant's] crimes. [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1227 (*Houston*).)

As a corollary of these notice requirements, a defendant generally cannot be convicted of a greater offense than that with which he was charged. (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) But, as respondent points out, and the *Houston* case illustrates, this rule is subject to the forfeiture doctrine that governs criminal appeals, and

there may be instances where the failure to object to the greater offense in the trial court precludes the defendant from challenging his conviction for that offense on appeal. Based on our reading of the *Houston* decision, however, we do not believe this is one of those instances.

In *Houston*, the defendant was convicted of attempted *premeditated* murder, which carries a sentence of life in prison, even though he was only charged with attempted murder, which carries a maximum sentence of nine years. On appeal, he argued his life sentence violated due process because, in contravention of the statutory directive in section 664, the prosecution failed to allege the premeditation element in the accusatory pleading. (*Houston, supra*, 54 Cal.4th at p. 1225.) However, the Supreme Court ruled the defendant forfeited this claim by failing to raise it in the trial court. In so ruling, the court relied on two key facts: 1) the trial judge notified the defendant before the case was submitted to the jury that he could be sentenced to life in prison for attempted premediated murder, and 2) the jury was properly instructed and expressly found appellant acted with premeditation in attempting to murder his victims. (*Id*. at pp. 1227-1229.)

In one respect, our case is similar to *Houston* in that the jury was properly instructed and expressly found true allegations that were not contained in the accusatory pleading, namely, that during the kidnapping crimes alleged in counts 1 and 2, Michael suffered bodily harm and Mary was exposed to a substantial likelihood of death. But, unlike the situation in *Houston*, the trial judge here did not explain to appellant that a true finding on those allegations would increase his punishment from life in prison to LWOP.

In fact, the judge suggested those allegations would not increase his sentence at all when he told appellant the bodily harm allegation was "a special finding, but it's not technically a sentencing enhancement and the like." While a person trained in the arcana of California sentencing law would understand the judge was attempting to draw a distinction between the statutory element of an offense and a separate sentencing

enhancement provision, a layperson such as appellant might well construe the judge's comment simply to mean that a true finding on the bodily harm allegation would not result in appellant's sentence being enhanced or increased. And, at no point did anyone say anything that was likely to disabuse appellant of such a notion.

The judge also misdescribed the bodily harm allegation as requiring great bodily injury. This was not fatal in terms of providing appellant with notice of the charges, but it could not have facilitated his understanding of the proceedings and the complicated legal issues discussed therein. All things considered, we do not believe appellant forfeited his right to challenge the inclusion of the special allegations appurtenant to the kidnapping for ransom charges. (*People v. Perez* (2017) 18 Cal.App.5th 598, 614-618 [rejecting forfeiture claim where, as here, and unlike in *Houston*, the defendant was not apprised of the increased punishment he would receive if convicted of an uncharged greater offense]; *People v. Arias* (2010) 182 Cal.App.4th 1009, 1016-1021 [same].)

Turning to the merits, appellant contends his due process rights were infringed because he was never formally charged with aggravated kidnapping for ransom, nor was he ever advised he could be sentenced to LWOP if he were convicted of that offense. In light of the flexible pleading rules applicable in our state we conclude the contention fails.

It is well established that California's "'Penal Code permits accusatory pleadings to be amended at any stage of the proceedings "for any defect or insufficiency" (§ 1009), and bars reversal of a criminal judgment "by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits" (§ 960).' [Citations.]" (*People v. Sawyers* (2017) 15 Cal.App.5th 713, 720.)

It is equally true that an "[o]ral amendment of an accusatory pleading may suffice for statutory and due process purposes. [Citation.] 'The informal amendment

doctrine makes it clear that California law does not attach any talismanic significance to the existence of a written information.' [Citation.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 82.) Under that doctrine, "a defendant may, by his conduct, impliedly consent to amendment of a pleading. The '"proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment."' [Citation.]" (*Id*. at pp. 720-721.)

For purposes of these rules, there is no requirement that any specific words or express invocation be employed to effectuate a legally sufficient amendment of the charges. (*People v. Pettie, supra,* 16 Cal.App.5th at p. 84.) Rather, due process will be deemed satisfied if the record, considered as whole, shows the defendant received adequate notice of the prosecution's intent to charge him with a particular crime or enhancement, and the defendant, by word or conduct, acquiesced to the charge. (*Ibid*.; *People v. Haskin, supra,* 4 Cal.App.4th at p. 1438.)

Here, appellant had ample notice the prosecution wanted to charge him with aggravated kidnapping for ransom. It's true the information alleged simple kidnapping for ransom, and that charge was never formally amended. However, during the hearing on jury instructions, defense counsel did not object when the prosecution submitted instructions on aggravated kidnapping for ransom. Instead, defense counsel and appellant both agreed that instructions on lesser offenses were not required because this was an all-or-nothing case; either appellant participated in the kidnapping, in which case he was guilty of aggravated kidnapping for ransom, or he did not participate in the kidnapping, in which case he was not guilty of anything.

Furthermore, on the next court date, the judge explained he was going to instruct the jury on a special allegation pertaining to the kidnapping counts. In particular, he said he was going to ask the jury to consider whether, in committing the alleged kidnapping for ransom offenses, "great bodily injury" was inflicted. We recognize the

circumstance elevating simple kidnapping for ransom to aggravated kidnapping for ransom is "bodily harm," not "great bodily injury." (§ 209, subd. (a).) However, the two concepts are clearly related, and there was no dispute the victim sustained serious, life-threatening injuries in this case. Moreover, on the heels of this discussion, the prosecutor informed the court that, in regard to Mary, the state intended to prove the alternative circumstance needed to establish aggravated kidnapping for ransom, which is that the victim was exposed to a substantial likelihood of death. Given everything that was discussed at the hearing, there can be little doubt the prosecution was alleging both of the circumstances required to transform the charge of simple kidnapping for ransom into the aggravated form of that offense.

When the judge asked defense counsel if he objected to instructions or verdict forms pertaining to those allegations, he said no. He also voiced no objection when the prosecutor argued those allegations in closing argument or when the jury returned true findings thereon. On this record, we are confident the conditions for an informal amendment of the charges have been satisfied. Because appellant was apprised of the prosecutor's intent to prove the allegations required for aggravated kidnapping for ransom, because he acquiesced to those allegations, and because they could have no impact on the conduct of his mistaken identity defense. He was not deprived of his right to due process.[5]

In reaching this conclusion, we are mindful appellant was never expressly informed he could be sentenced to LWOP if the jury found the allegations true. In fact, as discussed above, that is the primary reason we did not apply the forfeiture doctrine to his due process claim. However, once appellant acquiesced to the prosecution's desire to include allegations of bodily harm and substantial likelihood of death with respect to the

[5] In contending appellant had adequate notice he could be sentenced to LWOP for his part in the kidnapping, the Attorney General draws our attention to two online news articles that allegedly mentioned this fact. However, those articles are not included in the record on appeal, and there is no evidence appellant ever saw them, so they have no bearing on our analysis.

kidnapping charges, those charges were effectively amended to allege the crime of aggravated kidnapping for ransom. Therefore, appellant was not convicted of a greater offense than with which he was charged, in derogation of his due process rights. He was instead convicted of an offense that was added by informal amendment to the existing charges. That being the case, there was no need to inform appellant of the punishment for that offense. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 747 [due process is satisfied if the defendant is fairly apprised of the specific factual allegations that will be invoked to increase the punishment for his crimes]; *People v. Robinson* (2004) 122 Cal.App.4th 275, 282 [same].)

Accomplice Instructions

At trial, the parties agreed Shegerian was an accomplice by virtue of her involvement in the case. Although the trial court instructed the jury the statements of an accomplice must be corroborated, the instruction on prior statements did not reiterate that requirement. Appellant fears this omission allowed the jury to convict him based on Shegerian's prior statements, even if they were not corroborated. We do not believe it is reasonably likely the jury construed the court's instructions in this fashion. They are not cause for reversal.

Pursuant to CALCRIM No. 335, the jury was instructed, "If the charged crimes were committed, then [Shegerian was an] accomplice[] to those crimes. You may not convict the defendant of any crime based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] One, the accomplice's statement . . . or testimony is supported by other evidence that you believe; [¶] Two, that supporting evidence is independent of the accomplice's statement or testimony and; [¶] Three, that supporting evidence tends to connect the defendant to the commission of the crime."

The court also gave CALCRIM No. 318, which told the jury, "If you decide that a witness made . . . statements [before trial], you may use those statements in two

ways: [¶] One, to evaluate whether the witness's testimony in court is believable; [¶] And two, as evidence that the information in those earlier statements [is] true."

Appellant does not dispute the correctness of these instructions. His argument is that the latter instruction on prior statements undermined the corroboration requirement set forth in the former instruction. However, appellant did not ask the trial judge to modify or clarify the instructions in order to remedy this purported error. He has thus forfeited his right to challenge the instructions on appeal. (*People v. Lee* (2011) 51 Cal.4th 620, 638 ["A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel . . . and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal"].)

Even if the argument had been preserved for appeal, it would not carry the day. In determining whether instructional error has occurred, we presume jurors are intelligent people who are capable of understanding and correlating all of the instructions they are given. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) Unless there is a reasonable likelihood the jury construed the challenged instructions in a manner that violated the defendant's rights, we must uphold the court's charge to the jury. (*Ibid.*; *People v. Rogers* (2006) 39 Cal.4th 826, 873.)

There was no such likelihood in this case because the challenged instructions addressed two different issues. CALCRIM No. 318, the instruction on prior statements, spoke to the permissible usage of Shegerian's extrajudicial statements from a general evidentiary standpoint. CALCRIM No. 335, the instruction on accomplice testimony, addressed the specific requirements for using Shegerian's statements to obtain a conviction. So even if the jurors used Shegerian's prior statements for their truth, as they were allowed to do under CALCRIM No. 318, they would have known from

CALCRIM No. 335 that they could not use those statements to convict unless they were corroborated by other evidence. In other words, viewing the instructions in light of one another, the jurors would have realized they could not convict appellant on the basis of uncorroborated pretrial statements that were made by Shegerian. Appellant's instructional claim is without merit.

The Two-Week Trial Recess

During the trial, the judge recessed the proceedings for 14 days over the course of the winter holidays. Appellant would have us believe this delay violated his state and federal due process rights. We think not.

Appellant's trial started in December 2017, roughly five years after he was arrested. At a pretrial hearing on December 5, the prosecutor asked the judge what days the court was going to be in session during the trial. After discussing the matter with counsel off the record, the judge stated, "We discussed the scheduling and it looks as if all parties are in agreement." "We'll be off [Tuesday, December] 26th through the 29th, and that we will be telling the jury that we will be doing evidence [December] 12th through the 22nd, and then we will be doing closing arguments probably like January 3rd." No one objected to this scheduling framework.

Six days later, on December 11, the judge met with counsel to discuss voir dire and the prospect of prescreening prospective jurors who might have time constraints due to work or prepaid vacations. The judge surmised those constraints might not be a problem for some of the prospective jurors because the court was going to be in recess during the week of Christmas. He also stated he would be time-qualifying the jurors through January 5, not including the time required for deliberations. Again, neither side objected to this scheduling proposal.

As it turned out, the trial did not begin until Thursday, December 14. That day, opening statements were given in the afternoon, and at the end of the session, the judge ordered the jurors to return on Monday, December 18 for the start of testimony.

After the jurors left the courtroom, the prosecutor informed the judge he was going to be moving through his witnesses pretty quickly because he and defense had been able to narrow the scope of certain testimony. In fact, throughout the trial, the parties worked hard[6] to streamline the case through the use of stipulations and other time-saving measures.

Consequently, the prosecution's case went faster than initially expected. By Wednesday, December 20, the prosecution was down to its final witness, lead detective Ryan Peters. Peters finished his testimony just before noon that day. At that time, the judge asked the parties if there was any reason he should not excuse the jury until January 3, 2018, and both sides answered no. The court then adjourned the trial until that date. In so doing, the court admonished the jurors not to discuss the case during the break or start forming opinions about the case until they began their deliberations.

When the trial resumed on January 3, the prosecution recalled Peters to the stand for a few brief questions before resting its case. Then the defense rested without presenting any evidence, and the parties made their closing arguments. The next day, the jury was instructed and received the case. After deliberating for less than three hours, it found appellant guilty as charged.

Appellant contends the 14-day recess that occurred from December 20 to January 3 violated his fair trial rights because, having heard the bulk of the prosecution's evidence by the 20th, the jurors would not have been able to keep an open mind over the course of the recess. However, of those 14 days, six were weekends or holidays and four (December 26 thru the 29th) were taken off by agreement of the parties, leaving only three and one-half unplanned recess days: The afternoon of the 20th, the 21st and 22nd, and January 2. And when the court adjourned on the 20th, appellant did not object to the court ordering a recess until January 3. He therefore waived his right to complain about

[6] We're impressed.

the delay attributable to those three and one-half days. (*People v. Ochoa* (2001) 26 Cal.4th 398, 441 [absent an objection, the waiver rule bars claims arising from the granting of a continuance during trial]; *People v. Johnson* (1993) 19 Cal.App.4th 778, 791-792 [by consenting thereto, the defendant waived his right to challenge a 17-day trial recess that occurred over the winter holidays].)

Waiver aside, the two-week delay in appellant's trial did not constitute an abuse of discretion or violate appellant's due process rights. (See generally *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 968 [the decision whether to order a midtrial continuance rests within the sound discretion of the trial court]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042 [to overturn a conviction on due process grounds the defendant bears a heavy burden to show the procedures used at trial were fundamentally unfair].) Had the court not recessed the trial on December 20, there is a good chance the jurors would have received the case before Christmas and felt rushed to deliver a verdict before that holiday arrived, with the prosecution's evidence fresh in their minds.[7] As it was, the jury was given ample time to process and evaluate the state's case before being asked to render a verdict. This prevented a rush to judgment based on temporary feelings of passion, prejudice, or inconvenience. (See *People v. Johnson, supra,* 19 Cal.App.4th at p. 791 [pointing out that forcing a jury to deliberate against a Christmas holiday deadline is often not in the best interest of the defendant].)

And the fact the recess occurred before deliberations commenced distinguishes this case from *People v. Santamaria* (1991) 229 Cal.App.3d 269, upon which appellant relies. When a recess occurs during deliberations, as it did in *Santamaria,* the jury may forget important aspects of the evidence or the court's instructions. (*Id*. at p. 282.) That danger was minimized here because the recess occurred before the jury heard closing arguments, during which the evidence was

[7] Appellant presented no defense.

discussed at length, and before the jury received its instructions from the court, which would clarify the analysis of that evidence. Considering all the pertinent circumstances, we do not believe the recess is cause for reversal.[8]

Sentencing Claims

Lastly, appellant contends his consecutive life sentences for aggravated mayhem and torture must be stayed under section 654 because those crimes were part and parcel of the kidnapping offense for which he was separately punished. Once again, we disagree.

Section 654 states, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The statute "applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.]" (*People v. Perez* (1979) 23 Cal.3d 545, 551; *In re Calvin S.* (2016) 5 Cal.App.5th 522, 533.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. If all of his crimes were carried out pursuant to a single objective, multiple punishment is prohibited. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) However, if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

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[8] This case is also distinguishable from *People v. Engleman* (1981) 116 Cal.App.3d Supp. 14, in which a three-week trial continuance was found to be "inherently prejudicial" because it undermined the jury's ability to fairly assess the evidence the defendant introduced at trial. (*Id*. at p. 21.) Since appellant did not present any evidence in his defense, that was not a concern here.

On appeal, we must remember the defendant's intent and objective present factual questions for the trial court, and its findings, whether express or implied, will be upheld if they are supported by substantial evidence. (*People v. Petronella* (2013) 218 Cal.App.4th 945, 964; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) Under the substantial evidence test, "our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted; accord, *People v. Petronella, supra*, 218 Cal.App.4th at p. 964; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

The crimes in this case involved a course of conduct that started with the victims being kidnapped from their home in Newport Beach and ended two and a half hours later when they were left out in the Mojave Desert. During that period of time, the kidnappers tortured Michael repeatedly, and once they realized they were not going to get the million dollars they were after, they cut off his penis, which was the basis for the aggravated mayhem count. Appellant contends section 654 applies to the torture count because the only reason he and his cohorts tortured Michael was to get him to tell them where the million dollars was, which is why they kidnapped him in the first place.

At sentencing, the trial judge rejected this contention because, besides torturing Michael in the back of the van to find out where the money was, the kidnappers also poured bleach on Michael after they cut off his penis. The judge found the bleach pouring amounted to a torturous act that was done not to get Michael to reveal the location of the money, but simply to add to the pain and suffering he had already endured. Indeed, the record indicates that one of the effects of pouring bleach on Michael was that the kidnappers' footprints became permanently seared into his skin.

Relying on *People v. Siko* (1988) 45 Cal.3d 820, 825-826 and *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1337-1340, appellant contends the judge's finding regarding the purpose of the bleach pouring was foreclosed by the prosecutor's closing argument, in which he asserted the kidnappers doused Michael with bleach to destroy their DNA. Those cases stand for the proposition that if there is a basis for identifying the specific factual basis for a verdict, such as the charging documents, closing arguments or verdict forms, the trial court may not rely on other acts to avoid application of section 654. (*Ibid*.) By parity of reasoning, appellant contends that because the prosecutor referenced the destruction of DNA as a motive for the bleach pouring, the trial judge was precluded from finding the act was done for any additional reason. However, the prosecutor did not argue the destruction of DNA was the *only* reason the kidnappers poured bleach on Michael and their cavalier disposal of his penis supports the idea they could well have harbored baser motives at that time. Therefore, the judge was free to find the act was done for some other reason as well, such as torture. (*Ibid*.) Suffice it to say, there is substantial evidence in the record to support the judge's finding the bleach pouring had multiple motives and was not done for the sole purpose of destroying evidence.

Still, appellant contends the judge's reliance on the bleach-pouring incident as the basis for not applying section 654 to the torture count was improper because the act of pouring bleach on Michael did not amount to torture. Appellant does not dispute the act caused Michael great bodily injury, the first element of torture. But he does dispute the sufficiency of the evidence to support the second element, namely, that by pouring the bleach, he and his cohorts intended to cause Michael to suffer cruel or extreme pain "for the purpose of revenge, extortion, persuasion, or for any sadistic purpose[.]" (§ 206.)

In challenging this element, appellant again relies on the prosecutor's claim during closing argument that the kidnappers poured bleach on Michael to destroy their DNA. To appellant's way of thinking, this claim proves the destruction of evidence was

the sole reason for the bleach. However, if the kidnappers were so transfixed on destroying their DNA, they would have poured bleach on Mary too. Their failure to do so supports the conclusion they had an additional reason for dousing Michael with bleach, which was either to exact revenge on him for not telling them where the money was and/or to simply make him suffer, which is the hallmark of sadism. Either way, the bleach-pouring act was a sufficient basis for the trial judge's torture theory. The judge was not remiss for relying on that act in considering the applicability of section 654 in connection with the kidnapping for ransom counts and the torture count. We discern no basis for disturbing appellant's life sentence for torturing Michael.

As for the aggravated mayhem count, appellant argues his sentence for that offense should have been stayed pursuant to section 654 because it was based on the same act – the severing of Michael's penis – that supported the bodily harm element of the aggravated kidnapping for ransom charge in count 1. In so arguing, appellant admits there were other acts that could have supported the bodily harm element, such as the blowtorching or the tasering. However, he insists that doesn't matter because the prosecutor "specifically elected" not to rely on those acts in urging the jury to convict him on count 1.

The record does not support appellant's position. While the prosecutor alluded to the kidnappers' act of severing Michael's penis while discussing the bodily harm element of the aggravated kidnapping for ransom charge, he did not tell the jury to ignore all of the other bodily harm Michael suffered in deciding whether appellant was guilty of that offense. To the contrary, the prosecutor urged the jury to consider everything Michael went through and all the injuries he received. Therefore, it cannot be said that the prosecutor elected to base the bodily harm allegation solely on the dismembering of Michael's penis.

Because the prosecutor did not elect to prove the bodily harm allegation on such a limited basis, and because there is nothing else in the record that reveals which act

or acts the jury relied on in finding that allegation to be true, the trial judge was free to consider all of the evidence adduced at trial in determining whether section 654 applied to appellant's sentences for aggravated mayhem and aggravated kidnapping for ransom. (*People v. Siko, supra,* 45 Cal.3d at pp. 825–826; *People v. McCoy, supra,* 208 Cal.App.4th at p. 1340.) Having reviewed the entire record ourselves, we are convinced there is substantial evidence to support the trial court's implied finding those two offenses were based on different acts and committed for different reasons. Therefore, appellant is not entitled to relief under section 654.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

DUNNING, J.*

*Retired judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.